STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of North American Car Corp.	:
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Franchise Tax on Business Corporations under Article 9A of the Tax Law for the Years 1953 - 1970, and of License Fees on Foreign Corporations under Article 9 of the Tax Law for the Year 1954.	: AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon North American Car Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

North American Car Corp.
222 South Riverside Plaza
Chicago, IL 60606

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Annie A. Hagelund

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
North American Car Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision : of a Determination or a Refund of Franchise Tax on Business Corporations under Article 9A of the Tax : Law for the Years 1953 - 1970, and of License Fees on Foreign Corporations under Article 9 of the Tax: Law for the Year 1954.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Gregory J. Perry the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gregory J. Perry
Pedersen & Houpt
180 N. LaSalle St., Suite 3406
Chicago, IL 60601

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Annie A. Hagglund

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 2, 1981

North American Car Corp.
222 South Riverside Plaza
Chicago, IL 60606

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Gregory J. Perry
Pedersen & Houpt
180 N. LaSalle St., Suite 3406
Chicago, IL 60601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of NORTH AMERICAN CAR CORPORATION for Redetermination of a Deficiency or for Refund of Franchise Tax on Business Corporations under Article 9-A of the Tax Law for the Years 1953 through 1970, and of License Fees on Foreign Corporations under Article 9 of the Tax Law for the Year 1954.	DECISION

Petitioner, North American Car Corporation, 222 South Riverside Plaza, Chicago, Illinois 60606, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1953 through 1970, and of license fees on foreign corporations under Article 9 of the Tax Law for the year 1954 (File No. 11681).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1977 at 1:15 P.M. Petitioner appeared by Pedersen & Houpt, P.C. (Matt P. Cushner and Gregory C. Perry, Esqs., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether petitioner's activities within New York constituted doing business in this State so as to subject petitioner to the license fee imposed by section 181 of the Tax Law and to the franchise tax imposed by section 209 of the Tax Law.

II. Whether petitioner is, in addition, liable for penalties for failure to file returns under Articles 9 and 9-A of the Tax Law and to pay the taxes required to be shown on such returns.

FINDINGS OF FACT

1. On December 15, 1972, the Audit Division issued to petitioner, North American Car Corporation ("North American"), notices of assessment of franchise tax for the years 1953 through 1963, asserting taxes due in the amount of $244,890.71, plus penalties of $380,774.10, for a total sum of $625,664.81. The amount asserted to be due for 1954 included a license fee pursuant to section 181 of the Tax Law in the amount of $2,846.71.

2. On February 15, 1973, the Audit Division issued to petitioner notices of deficiency for the years 1964 through 1970, asserting franchise taxes due in the amount of $307,153.00, with interest thereon of $88,644.20, plus penalties of $76,788.26, for a total due of $472,585.46.

The statements of audit adjustment accompanying the aforesaid notices of deficiency each asserted that the taxes were "estimated in accordance with Field Audit recommendations."

3. North American timely filed applications for revision for the years 1953 through 1963 and petitions for redetermination of deficiencies for 1964 through 1970. In response to a departmental request, North American thereafter filed unsigned returns, for informational purposes, for 1968 and 1969.

4. At the formal hearing, petitioner conceded that it was liable for franchise taxes in 1969 and thereafter, because of amendments to Article 9-A of the Tax Law enacted in said year (L. 1969, Ch. 1072). However, petitioner has consistently maintained that it bears no such liability for all other years at issue herein, since its only contact with New York State throughout the period

consisted of maintenance of a sales office in New York. Petitioner also contested the amounts of all franchise taxes asserted to be due by the Audit Division, on the ground that computations were made on the basis of insufficient information.

5. Petitioner is incorporated in Delaware and has its principal place of business in Chicago, Illinois.

6. The business of petitioner is in the long-term leasing of railway rolling stock, which are utilized by the lessees anywhere in the continguous forty-eight states, Canada and/or Mexico.

7. Petitioner maintains two assembly facilities, at Texarkana, Arkansas and at Chicago Ridge, Illinois, where the rolling stock are assembled and shipped therefrom via common carrier to lessees. Some lessees received delivery of equipment in New York.

8. Petitioner owned no real property in New York State during the period herein involved, nor did petitioner maintain any inventory of products in the State during such period.

9. The New York office aforementioned was utilized by petitioner as a multi-state regional office for soliciting offers for railroad car leases in the northeastern part of the United States. The leasing contracts which arose out of contacts initiated by the sales personnel of the New York office were signed by the lessee, as offeror, in New York and forwarded to Chicago for acceptance or rejection. Rental fees were also collected by the Chicago office.

10. During the period involved, petitioner's New York office staff varied from three to eight persons, including clerical and sales positions. The salesmen were "on the road" approximately 75 percent of the time, and in the

office the remainder of the time. Exclusive authority over payroll, hiring and discharging was vested in the Chicago office.

11. In the event that a customer who had leased equipment through contacts with one of petitioner's New York-based salesman had a complaint with regard to said equipment, he generally telephoned the New York office with his complaint. The New York office was required to contact Chicago headquarters for instructions as to which repair facility the lessee should send the railroad car, by common carrier. (Petitioner's repair stations were situated in Iowa, Illinois and Delaware.) These instructions were then relayed to the customer by the particular salesman.

12. Petitioner did not file any legal action within New York State during the period 1953 through 1968, nor was it sued within the State during such period.

13. Approximately ten percent of petitioner's revenue was generated by its New York office; of a total of approximately 40,000 pieces of equipment on lease from North American at any given point in time, approximately twenty percent were on lease through the New York office.

14. Petitioner's present tax manager (who was not in the employ of North American during the period at issue) testified at the formal hearing that after examining petitioner's files relating to the instant matter, he could find therein no indication that petitioner believed it had liability for the taxes at issue; and further that, in his opinion, petitioner had no such liability prior to 1969.

CONCLUSIONS OF LAW

A. That section 181 of the Tax Law imposes upon every foreign corporation doing business in New York (with certain exceptions not pertinent here) a

license fee for the privilege of conducting its business in such corporate capacity within this State.

B. That section 209 of the Tax Law, prior to its amendment in 1969 (L. 1969, Ch. 1072), provided in relevant part:

> "1. For the privilege of exercising its franchise or doing business in this state in a corporate or organized capacity for all or any part of each of its fiscal or calendar years...every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided...".

C. That whether a foreign corporation, which owns no real property in New York, is doing business in this State is to be determined by the factual circumstances of each case. Consideration is given to the following factors:

> (1) the nature and extent of the activities of the corporation in New York, compared with its activities elsewhere;
>
> (2) the purposes for which the corporation was organized, compared with its activities in New York;
>
> (3) the location of its offices and other places of business;
>
> (4) the continuity, frequency and regularity of the activities of the corporation in New York, compared with the continuity, frequency and regularity of its activities elsewhere;
>
> (5) the income of the corporation and the portion thereof derived from activities in New York;
>
> (6) the employment in New York of agents, officers and employees;
>
> (7) the location of the actual seat of management or control of the corporation.
>
> Ruling of the State Tax Commission, March 14, 1962, Section 1.6(c).

D. That the sales activities conducted at petitioner's New York office were directly in furtherance of the purpose for which the corporation was organized. The office space rented by petitioner in New York was utilized for the solicitation of business on a continuous basis. Lessees regularly brought their complaints about equipment to the attention of North American's New York office, which acted to resolve, with headquarters' approval, such customer problems. Moreover, petitioner derived rental income from leasing of rolling stock in New York.

E. That the maintenance of a sales office from which orders were regularly solicited, or the holding of tangible personal property in New York by a foreign corporation were insufficient by themselves, prior to 1969, to subject the foreign corporation to franchise taxes under section 209 of the Tax Law. McKinney's 1969 Session Laws of New York, Memo. Dept. of Taxation and Finance 2503; Rep. Special Subcomm. on State Taxation of Interstate Commerce of House Jud. Comm., 1 N.Y. Tax Rep. (CCH) ¶5-101.354.

However, the activities of petitioner in New York, enumerated at Conclusion of Law "D", supra, go substantially beyond the solicitation and promotion of its products, Cf. Matter of Gillette Co. v. State Tax Commission, 56 A.D.2d 475, aff'd, 45 N.Y.2d 846 (1978), and beyond the mere holding of rolling stock in this State. The totality of petitioner's activities provided a sufficient nexus with New York State to justify imposition upon petitioner of franchise taxes, fairly apportioned. See generally, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977); and Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975).

F. That, on the basis of Conclusions of Law "D" and "E", petitioner was, in addition, liable for the license fee imposed by section 181 of the Tax Law for the year 1954.

G. That inasmuch as petitioner's failure to file returns under Articles 9 and 9-A of the Tax Law, and to pay the taxes required to be shown on such returns, was not due to willful neglect but to its bona fide belief that maintenance of a sales office was insufficient contact to subject it to franchise taxes, the penalties therefor are hereby cancelled. Matter of Jaycee Fleet Leasing Corp., State Tax Commission, September 18, 1972.

H. That the petition of North American Car Corporation is granted to the extent indicated in Conclusion of Law "G", and that except as so granted, the petition is in all other respects denied; and that petitioner is hereby directed to file returns and make payment of taxes under the applicable provisions of Articles 9 and 9-A.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER